Supreme Court, U.S.
FILED
OCT 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY
AND
ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioners,

vs.

JOSEPH CAHILL
AND
ROBERT ABRAMS, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

SUPPLEMENTAL BRIEF

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Petitioners allege that respondents have misrepresented actions taken by the Public Service Commission. Petitioners' Reply at 1-3 and nn. 1-4. Respondent Abrams submits this supplemental brief pursuant to Supreme Court Rule 15.7[1] solely to respond to that allegation.

[1] Rule 15.7 permits submission of a supplemental brief while a petition for certiorari is pending to call to the Court's attention "... intervening matter not available at the time of the party's last filing." While this Rule does not envision the submission of a response to arguments on the merits raised in a Reply, respondent respectfully submits that a charge of misrepresentation constitutes new matter that necessarily could not have been addressed in a previous filing. A supplemental brief responding to such a contention is thus permitted by the Rule. It is particularly warranted when, as here, the matter in dispute implicates the Court's jurisdiction.

Petitioners contend that respondents have failed to disclose that the Public Service Commission's abandonment of the policy challenged in the courts below was prompted by its duty to comply with a lawful mandate of the Appellate Division that had not been stayed. Nothing in respondents' submissions, however, suggested that the Public Service Commission was not legally obligated to comply with, or that the Commission did not feel constrained by, the court's mandate. But petitioners ignore entirely the simple, and dispositive, fact that the Commission did not appeal the Appellate Division's order to the Court of Appeals and that it therefore necessarily is not before this Court. At least as far as this Court's jurisdiction is concerned, by that deliberate decision not to appeal, the Public Service Commission forfeited its opportunity for judicial review. It was that decision, more than the orders it subsequently issued, that constituted the "revisiting" and abandonment of its pass-along policy. The Commission's subsequent orders were simply a necessary consequence of its decision not to appeal a court order that affirmed a judgment annulling that policy. (A-22, A-27).[2]

Nor could any dicta contained in the Administrative Law Judge's recommended decision in the RG&E case, *see* Petitioners' Reply at 2 n.2, discussing the possibility of a restoration of the pass-along if the Appellate Division's order were reversed, or

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[2] Petitioners attribute to the Commission statements in its October 13, 1989 order, which involved the rates of Consolidated Edison Company. Petitioners' Reply at 2 n.2. In fact, these statements were characterizations by the Commission of positions taken by the utility and the Commission's staff. Thus, the Commission did not base its decision on the fact that "all court appeals have not been exhausted" and did not decide that "if the final outcome of *Cahill* supports an allowance, we can prescribe a method for recovery of the deferred amount." Petitioners' Reply at 2 n.2 (quoting Abrams App. A-7). Rather, the Commission rejected a joint proposal of the utility and the Commission's staff that the contributions be included in the rate base pending final resolution of *Cahill*, and simply "eliminat[ed] any recoveries for charitable contributions expense". Abrams App. at A-8. The Commission also eliminated any pass-along of charitable contributions when it ruled in the RG&E case on July 6, 1990. Abrams App. A-11, 13, 16, 19 (entries specifying "O" (zero) for "Donations" and "Contributions Passback").

a preamble in a stipulation adjourning a judicial challenge to the Consolidated Edison Company order, alter the essential fact that once the Commission chose to abandon its defense of the challenged policy, there could be no reversal in a court bound by Article III of the Constitution. *Diamond v. Charles*, 476 U.S. 54, 62-65 (1986).